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No. 88-929

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

JOSEPH ROBICHAUD AND CITIZENS
IN SUPPORT OF ATTLEBORO MALL,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, *ET AL.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY OF PETITIONERS JOSEPH ROBICHAUD AND CITIZENS IN SUPPORT OF ATTLEBORO MALL

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Petitioners Joseph Robichaud and Citizens in Support of Attleboro Mall principally argued in their petition that the Environmental Protection Agency (EPA) exceeded its statutory authority under Section 404(c) of the Clean Water Act (33 U.S.C. 1344(c)) by taking into account the loss of other wetlands regionally and nationally in deciding to veto a fill permit for part of Sweedens Swamp (an admittedly *isolated* swamp unconnected to those other wetlands), rather than focusing on the environmental impacts at the site in question. Pet. 6-12. The EPA responds that Section 404(c) "does not limit the regions that the Administrator may take into account in making his determination, and it certainly does not require him to consider only the effect on the particular wetland site." Opp. at 14. The EPA elaborates by stating that a change in the quality of a particular wetland

"is likely *to affect* the quality of surrounding regions" and that it would not be "sensible" to construe Section 404(c) narrowly. *Id.* (emphasis added). The EPA notes that Section 404(c) does not forbid the EPA from considering the environmental impact of the proposed fill "on surrounding areas." *Id.* at 15, n.6.

It is not surprising that EPA is unable to cite to any authority for the novel proposition that a government agency can consider any factor it pleases, sensible or otherwise, in its decisionmaking process, so long as Congress did not expressly forbid the agency from considering such factors. If that were the law, Congress would henceforth have to draft already prolix statutes in such a way as to include an exhaustive list of what an agency cannot do in addition to what the agency is authorized to do under the law. But even if the EPA is correct, the consideration of the historical loss of other wetlands by the EPA in this case as an "important" reason for vetoing the permit to fill a portion of Sweedens Swamp does not even meet the EPA's own test as formulated in its Opposition. For in the proceedings below, EPA demonstrated no connection whatsoever between whatever wildlife habitat may be lost at Sweedens Swamp and the loss of wetlands regionally or nationally.

But even assuming that the EPA can consider the environmental impact of the fill on the "surrounding regions" or "surrounding areas", Opp. at 14 and n.6, the EPA Administrator did much more than look at the impact that the filling of Sweedens Swamp may have *in futuro* on the "surrounding" or adjacent areas. As the EPA makes clear in its final determination and as recounted in our brief, the EPA considered the *historical* loss of wetlands generally in the region and nationally, losses which have absolutely nothing to do with the filling in of Sweedens Swamp in the future. Pet. at 6. By all common sense and logic, the losses of wetlands in the past could not have been

caused by a proposal to fill Sweedens Swamp in the future. Nor does the EPA make any pretense of an argument that the filling of Sweedens Swamp in the future would even cause any adverse effect in the future on any other wetland. In short, the EPA seriously misleads this Court by suggesting that the EPA simply considered the impact of the proposed fill at Sweedens Swamp on "surrounding" areas. What the EPA is really attempting to do here is to claim an unprecedented and sweeping power to veto any fill permit when in its view, enough wetlands statewide, regionally, or nationwide, have *already* been filled in. While a policy of "no net wetland loss" may be desirable by some, such controversial policies are to be decided by the proper branch of government, namely, the Congress.

The question presented is not merely one of whether the agency abused its discretion; rather, the question is whether the agency had any authority at all to consider a factor it deemed "important" in making its decision, but one which Congress did not intend for the agency to consider. Accordingly, the issue raised by petitioners demands review by this Court to ensure that neither the agency nor the courts usurp the policy and lawmaking powers properly belonging to the Congress.

Respectfully submitted,

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